DIVORCE DISPUTE RESOLUTION:
NEW ADR RULES ADOPTED

On October 19, 2005, the Supreme Court signed an Order promulgating the new Arizona Rules of Family Law Procedure making them effective on January 1, 2006. The author of this article worked on the subcommittee of the Rule Committee assigned the task of writing the new ADR rules in Family Law cases. These rules can be obtained on the Arizona Supreme Court website, www.supreme.state.az.us/drrc.

Section VIII of the new rules is entitled "Settlements and Alternative Dispute Resolution (ADR)". For practitioners in Maricopa County, the new ADR rules are basically a restatement of the Maricopa County Rules contained in Local Rule 6.10, 6.11 and 6.12 with more detail, some clarification and some new provisions. This article will discuss some of the new state-wide ADR provisions in the Arizona Rules of Family Law Procedures (ARFLP).

New Rule 66 ARFLP makes it clear that the Supreme Court encourages the use of non-adversarial means of alternative dispute resolution to the greatest extent possible. Private mediation is specifically encouraged. Rule 66 also incorporates the language of ARFLP Rule 16 (g), requiring all parties to attempt to settle or agree on an ADR process, and permitting the Court to direct the parties to participate in one or more ADR processes authorized by the rules or agreed to by the parties.

Mediation, arbitration, and settlement conferences are specifically addressed in new Rule 67 ARFLP. Mediator confidentiality and a prohibition against ex parte communications with the Judge or Commissioner, is addressed in subsection (A) of Rule 67. Interestingly, this rule states that a mediator may not conduct any other form of dispute resolution process in the same case, unless agreed to by the parties and approved by the Court. This appears to be a compromise by the committee after much debate over the original proposed provision which strictly prohibited such conduct. An example of when this provision will apply is where the parties have agreed to allow the ADR neutral to engage in a Med/Arb procedure whereby the neutral first attempts to facilitate a resolution of issues between the parties through mediation and the parties agree that any remaining unresolved issues can be decided by the neutral as an arbitrator. It may also apply if the parties, who earlier requested the mediator to perform an early neutral evaluation of their dispute, later come back to the mediator and agree to have him or her act as a mediator or an arbitrator. In these circumstances, Rule 67(A) requires "approval by the Court".

Subsection B of Rule 67 ARFLP sets forth the processes and procedures to be followed in a mediation. This rule now makes it clear that mediation may be used to resolve any issues in dispute in a Family Law case, not just ones involving custody or parenting time. The Rule provides that the parties may agree to a private mediator or ask the Court to appoint one from a list provided by them or from a roster of mediators maintained by the Court. The new rules do not give any guidance to the local Courts

about the policies or procedures for choosing mediators to be placed on their rosters or how the roster should be maintained. Therefore, it appears that these details will be left to each jurisdiction to develop.

The Court may decide to refer a matter for mediation if it appears inappropriate for reasons such as parental unfitness, substance abuse, mental incapacity, domestic violence or other good cause or that mediation will cause undue delay. The new Rules do not prevent mediation where there has been domestic violence, but requires that there be policies and procedures in place that protect the victim from harm, harassment, or intimidation. A victim of domestic violence may request a waiver of mediation. The Court could grant the waiver or require specific procedures to protect the victim.

New Rule 67 (B)(4), ARFLP, now prevents a default from being entered against a party while the parties are in mediation. This provision appears to apply only when there has been an order or referral to mediation by the Court, and allows the prohibition to be lifted upon the mediator filing a report with the Court advising the Court that mediation has concluded or by court order lifting the prohibition, presumably on motion filed by the party wishing to file the application for default.

The new rules require the parties to prepare and submit a Pre-Mediation Statement to the mediator and allow sanctions to be imposed for failing to do so. The Pre-mediation Statement is not filed with the Court.

Previously, in Maricopa County and possibly in other counties, mediators were sometimes asked to communicate to the Court about what was said or done during a mediation, usually when one party claimed that someone had not participated in good faith in the mediation. Subsection (9) of new Rule 67(B) makes it clear that the mediator may discuss only scheduling issues with the Court so long as the substance of what was said or done by the parties or their counsel during mediation remains confidential. The rule goes further and states "other than reporting to the Court about matters set forth in this Rule, unless otherwise agreed by the parties or required or permitted by law, the mediator shall not report to the Court about anything that was said or done before or during the mediation". The rule also states that the Court may impose sanctions for a violation of the rule - presumably, that means the mediator may be sanctioned.

There has been much discussion about settlement conferences and whether a settlement conference is a "mediation" or some other animal altogether. The current Maricopa County rules state only that the Court shall develop policies and procedures for the conduct of settlement conferences in family-related cases. However, no clear policies or procedures have ever been developed. Although the author of this article attempted to convince the Rules Committee to clarify the issue by specifically stating in the Rules that a Settlement Conference will be considered a "mediation" for the purpose of invoking the confidentiality provisions of A.R.S. §12-2238, the language proposed was rejected by the committee. However, new Rule 67 (D) now does provide greater detail about the procedures to be used in Settlement Conferences and the issue of confidentiality in Settlement Conferences has been addressed. New Rule 66 (B)(6) defines a Settlement

Conference as "a confidential process…". Rule 67 (D)(7) allows the Settlement Conference Judge or Commissioner to file only a statement that the parties met and were unsuccessful if the parties fail to reach agreement, and only a statement of agreements reached and issues remaining if they are partially successful. The rule clearly now states "the settlement conference Judge shall not report that positions of the parties and shall not comment upon or offer any opinion about the position of any party".

An interesting debate developed during the promulgation of these rules over the issue of good faith and whether the settlement conference officer should be able to advise the Court of his or her opinion in regard to the good faith participation of a party or the reasonableness of a party's position during mediation. The author proposed to the Rules Committee a draft of the rules that specifically prohibited such communication by the settlement officer because in my view such communication would make a mockery of any claim of confidentiality and good faith litigation was not particularly useful or beneficial to the process or the parties. The Rules Committee originally disagreed with my view and the original draft of the Rules contained a provision that would allow Settlement Conference officers to testify on the position of the parties in regard to the issue of attorney fees after the Decree of Dissolution had been granted. Thankfully, enough attorneys opposed this provision and it was ultimately removed from the rules and the rules now specifically prohibit the Settlement Conference officer from communicating on the positions of the parties as quoted above. In addition, the "Committee Comment" to Rule 67 states: "This rule is not intended to create, encourage, or result in ancillary court proceedings involving the motives, conduct or communications of the parties, unless otherwise required by law".

The new Rules clarify that the Judge, Commissioner, or Judge Pro Tempore conducting the Settlement Conference can sign a Decree of Dissolution that conforms to the agreements of the parties and their signature will have the same force and effect as a Decree signed by the Judge or Commissioner to whom the case is assigned.

New Rule 69, ARFLP, is entitled "Binding Agreements" and makes a significant change to Rule 80(d), ARCP as it applied to Family Law Cases. Previously under Rule 80(d) an agreement not in writing was not binding unless it was made orally "in open court and entered in the Minutes". Now, under Rule 69, an agreement is binding if it is in writing or "made or confirmed on the record before a Judge, Commissioner, Judge Pro Tempore, court reporter or other person authorized by local rule or administrative order to accept such agreements". The comment to this rule states that an agreement is "on the record" if it is conducted or memorialized by a court reporter… or if recorded by any recording devise authorized by law." The comment points our that Arizona Statutes authorize the use of tape recorders or other recording devises in lieu of reporters or stenographers, and suggests that parties can recite a binding agreement on the record at the time of a deposition.

New Rule 72, ARFLP, permits the Court to appoint a Family Law Master to deal with any issues pursuant to ARS Title 25. The Family Law Master would act in the same capacity that a Special Master acts under Rule 53, ARCP. The Judge to whom the case is

assigned retains the final decision making authority after receiving the report of the Family Law Special Master and ruling on any objections.

New Rule 73, ARFLP, now contains the authority for the Family Law Conference Officer previously authorized by Rule 53 (k) ARCP, and implemented in Maricopa county in Local Rule 6.14. The Family Law Conference Officer is authorized to meet with the parties and make recommendations to the Court regarding issues of establishment, enforcement or modification of support (both child support and spousal maintenance) including medical coverage or uncovered medical costs, and the enforcement of custody and parenting time. The powers of the Family Law Conference Officer have been expanded, however, to allow the conference officer to prepare agreements reached by the parties during a conference on issues of paternity and the division of property and debts. The conferences held by the conference officer are intended to serve an alternative dispute resolution function, but the proceedings are not confidential.

New Rule 74, ARFLP, contains the rules applicable to the appointment of a Parenting Coordinator. This rule changes the name of what was known in Maricopa County as the Family Court Advisor. Here again, the Parenting Coordinator has an alternative dispute resolution feature without confidentiality.

In summary, the new Arizona Rules of Family Law Procedure are an excellent start to providing uniform ADR policies and procedures for all counties in Arizona. The alternative dispute resolution mechanisms set forth in the Rules will assist the Family Law Courts of this state in providing swift, efficient and just resolution to the cases that come before them. These rules, however, will surely change over time and all ADR practitioners should not hesitate to comment on the Rules and seek changes where appropriate.